In the Supreme Court of the United States.

OCTOBER TERM, 1884.

DAVID H. MOFFATT, Jr., AND Robert E. Carr, appellants, *vs.* THE UNITED STATES. } No. 5.

DAVID H. MOFFATT, Jr., appellant, *vs.* THE UNITED STATES. } No. 6.

APPEALS FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF COLORADO.

BRIEF FOR THE UNITED STATES.

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These causes are *one* cause, substantially, and should be argued as such.

The United States files these bills for the purpose of cancelling two patents.

Looking at the *second* amended bill in No. 5 (R., pp. 40–45), which presents the case on which the court below

passed, the original and first amended bills being altogether merged therein, we find the gravamen of the case made to be: that the register and receiver of public lands at Pueblo, in the Arkansas Valley land district, conspiring to defraud the Government out of the land in question, fabricated certain proceedings under the pre-emption law, whereby it was made to appear that Philip Quinlan, a person entirely supposititious, had declared his intention to claim said land as a pre-emptor, and that two other supposititious persons, Michael Quinlan and Orrin R. Peasley, had deposed before said register and receiver that Philip Quinlan had duly complied with the conditions of the pre-emption law. The bill avers that the land records show a deed from the pretended Philip Quinlan to a fictitious person named Henry H. Perry, in May, 1873, and a deed from said pretended Perry to the appellant, Moffatt, who, in September, 1873, conveyed an undivided moiety of the land to the appellant, Robert E. Carr, and that such proceedings were had that a patent was issued in the name of Philip Quinlan for the land on the 4th October, 1873.

In the *second* amended bill in No. 6 (R. pp. 27–32), which presents the case on which the court below passed, the original and first amended bills being altogether merged therein, we find identically the same conspiracy set out as to another tract of land, and in the name of other suppositious persons, the pretended pre-emptor in this case being Eli Turner, and the pretended witnesses, to prove compliance with the pre-emption law, being Simeon D. Porter and Anson Beck. The bill avers a conveyance from the pretended Eli Turner, to a fictitious per-

son called Thomas Harris, in June, 1873, and a conveyance from Harris to the appellant Moffatt in the same month of June, and that such proceedings were had that, afterwards, on the 4th of October, 1873, a patent was issued for the said land in the name of Eli Turner.

It is these two patents which it is sought to have canceled.

The conclusion deducible from the complainants' testimony that neither Philip Quinlan nor Eli Turner was a real person cannot be successfully gainsaid. This testimony comes from witnesses who lived at the very place where the land in question lies, who were frequently on the land, and some of whom filled public positions in the county where the land is, and they depose that they never knew or heard of Philip Quinlan or Eli Turner, and that the improvements mentioned in the pre-emption proceedings were never erected.

Vide the depositions of Van Horn (p. 58), Boggs (p. 60), Cahill (p. 64), Vandiver (p. 66), Woodworth (p. 70), Peck (p.72), Carpenter (p. 74), Bowman (p. 76), Carroll (p. 79), Boomer (p. 80), Hill (p. 87), Simpson (p. 112).

To discredit these witnesses touching the points mentioned would involve credulousness to the extent of believing that persons answering to the names of Philip Quinlan and Eli Turner could have lived, as settlers, with the witnesses within so narrow limits and yet not be seen or heard of any of them.

The question, then, presented for decision is whether a patent in the name of a fictitious pre-emptor can have validity, as between the Government and the patentee, or any person claiming under him.

Congress, in order to promote the settlement of the public domain by desirable persons, passed the pre-emption laws, whereby a settler, upon compliance with their requirements, could secure a home upon easy terms.

It was a prime object to prevent any purchaser on speculation from purchasing land on these liberal terms. The law therefore requires that the pre-emptor shall make oath, among other things, that he has not settled upon and improved the land applied for on speculation, but in good faith to appropriate it to his own exclusive use, and that he has not made any contract by which the title he might acquire from the United States should inure in whole or in part to the benefit of any person except himself. (R. S., section 2262.)

The question presented is supposed to be *primæ impressionis*.

It is submitted that in order to prevent constant frauds on the bounty of Congress, and to give the law a sense that will effectuate its intent, it must be held that proceedings taken to secure a pre-emption cannot be valid unless carried forward in the name of the identical person interested in them.

When the proceedings are carried on in a fictitious name, it must be with some sinister design—a design to perpetrate a fraud on the law.

If the proceedings are conducted in the name of the party interested in them, he is amenable to prosecution if he swear falsely; but how small are the chances of bringing to justice the abandoned persons who are suborned to appear in such proceedings under simulated names. Of course they disappear at once from the scene of their

crime. The pains and penalties of perjury, therefore, must be regarded as ineffective deterrents to prevent constant abuse of the liberality of the Government in the matter of pre-emptions.

Unless unscrupulous men are to be tempted to circumvent the law it would seem to be indispensable to hold that a patent in the name of a fictitious pre-emptor is null and void for every purpose.

Whatever may be said as to patents generally, we cannot lose sight of the fact that the pre-emption laws proceed from a policy which should be guarded and protected in some effective way.

If men would buy public lands on speculation they may do so in a lawful way, but they should not be suffered to take up public lands in the guise of settlers, in good faith, and under feigned names for the purposes of speculation merely, and so as speculators enjoy a bounty which Congress meant for those intending to live on the land and to till it.

These cases afford striking examples of the mischievousness of the reading of the pre-emption law insisted on by the appellants.

No one can read these records without being impressed with the fact that the attempt to pre-empt the lands in question was part and parcel of a speculation founded on the expectation that Las Animas was to be a railway terminus. The whole disreputable proceeding seems to be known in Colorado as the "Las Animas land-grab." The appellant Moffat has been and was, perhaps, then the president of the railway company that was to purchase the land. Indeed Senator Chaffee tells us, in his testimony

(R. p. 103, int. 20), that Moffatt gave as a reason for urging him to hurry the issuing of the patents that he had bought the land "to have a depot located on it, or some part of it, and he was anxious to get his patents issued in order to secure this location."

The case has a very bad atmosphere around it. Mr. Moffatt's grantors are myths, and there is a good deal of strong testimony to show that the documents constituting the pre-emption proceedings are in the handwriting, *signature* and all, of one Williams, a clerk in the land office at Pueblo. (*Vide* the depositions of Payton, p. 123; Stimson, p. 129; Barndollar, p. 131; Pickney, p. 132; O'Brien, p. 135).

It is true there is testimony adduced by the appellants, which is diametrically opposite to that of the witnesses referred to, but it is not sufficient to overbear what those witnesses say.

It is true that the bill discharges the defendants from the duty of answering under oath, but is it not remarkable as well as pregnant that the appellants, with an imputation of fraud of the most shameful kind resting on them, should have been willing to put a defense on file which was not verified by oath, or that they should have failed to depose, as witnesses, to their *bona fides* and innocence? It would have been much more becoming to pursue that course than the one of merely assailing the evidence of the Government as insufficient. The court is bound to notice, and to attach great importance to, the fact that neither Moffatt nor Carr *has dared to risk his oath on a single point of his defense.* Certainly this is not the conduct of innocent men, judging these men by the ordinary principles

of human conduct, the only standard by which they can be judged.

In reply to the argument founded on the municipal and county-bond cases, it is only necessary to say that it has been uniformly held that if it appear that there was no authority to issue a given obligation conferred by law the defense of purchaser bona fide cannot be sustained. In the cases at bar a radical jurisdictional fact is wanting, namely, the actual existence of a pre-emptor answering to the name used in the pre-emption proceedings, and no estoppal or presumption can take the place of that fact.

As to the point that the court should not have granted relief without requiring the complainant to do the equity of returning the scrip, or money paid for the patent, it is only necessary to refer to the provision of section 2262 of the Revised Statutes, that any person swearing falsely in the matter of a pre-emption application shall *forfeit* the money paid by him in furtherance of such application.

The argument that whoever was interested in the proceedings conducted in the name of the fictitious pre-emptors can take under the patents is somewhat extraordinary. If that argument is sound, then anybody can take under a grant in a name not his own without showing that he was also described sometimes by that name. In the case of Thomas *v.* Wyatt, 31 Mo., 188, relied on by appellants, a party was allowed to take under a patent on the ground that *he went under two names, one of which was used in the patent.* But where is the evidence in this case that Moffatt or Carr or anybody else was ever known by the name of Philip Quinlan or Eli Turner?

We have here, then, the case of the designation of

grantees in patents by names which are not known to be borne by any persons in existence, and this court is asked to give effect to grants *where there are no grantees.*

It is asked why did not complainant examine Stanton and Cook, the register and receiver of the land district where the frauds were perpetrated but it may be asked with much more significance, why were not these men examined by the appellants, if the pre-emption proceedings are free from fraud? The failure to examine these witnesses is another exhibition of indifference to character on the part of Moffatt and Carr, which is scarcely consistent with innocence and *bona fides.*

Can the plea of purchaser *bona fide* be suffered to be used as an instrument to subvert the beneficent policy of the pre-emption laws?

The necessity that the person seeking a pre-emption should be the identical person in whose name the application is made is a *jurisdictional requirement*, and the register and receiver have no more jurisdiction when the proceedings are taken in a fictitious name than the ordinary has to grant letters testamentary or of admistration on the estate of a *living* man. In neither case is it enough that a jurisdictional fact has been adjudged to exist. *It must have actually existed*, or there was no power to act.

This view, if sound, meets and overthrows the argument of purchaser *bona fide.*

But are Moffatt and Carr purchasers *bona fide?*

What they bought and what was conveyed to them were

equitable estates, for it is undeniable that all the conveyances were made before the patents issued. It would seem to follow, then, that if the legal title has left the Government, it must be in the patentees, if that were possible, they not being *in rerum natura*.

The several deeds are not spread on the records nor are we told what sort of conveyances they were. If they had been conveyances with general warranty there might be some handle to insist that the title had passed by estoppel. But as the patentees are purely fictitious it is difficult to see how the doctrine of estoppel could apply.

Having acquired no more than equitable estates, *if they acquired anything at all*, which is not admitted, the appellants took with notice of the vice in their titles.

The propositions of law relied on by the appellee are so well established that it has not been deemed necessary to refer to authorities.

It is submitted that the decrees must be affirmed.

WM. A. MAURAY,
Asst. Att'y-Gen'l.